No. 91-17

In the Supreme Court of the United States

OCTOBER TERM, 1991

ESTATE OF FLOYD COWART, PETITIONER

v.

NICKLOS DRILLING CO., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT

KENNETH W. STARR
Solicitor General

MAUREEN E. MAHONEY
Deputy Solicitor General

MICHAEL R. DREEBEN
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

MARSHALL J. BREGER
Solicitor of Labor

ALLEN H. FELDMAN
Associate Solicitor

STEVEN J. MANDEL
Deputy Associate Solicitor

EDWARD D. SIEGER
Attorney
Department of Labor
Washington, D.C. 20210

QUESTION PRESENTED

Section 33(g) of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 933(g), provides that if a "person entitled to compensation" settles a claim against a third party for less than the compensation that would be payable under the LHWCA without obtaining the prior written approval of the employer and the employer's insurance carrier, he forfeits his rights under the statute to compensation and medical benefits. The question presented is whether the approval and forfeiture provisions are applicable to a person who was not receiving and had not been awarded LHWCA compensation at the time he entered into the settlement with the third party.

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OPINIONS BELOW

The opinion of the court of appeals sitting en banc (J.A. 1-29) is reported at 927 F.2d 828. The panel opinion (J.A. 30-39) is reported at 907 F.2d 1552. The decision and order of the Benefits Review Board (J.A. 40-67) is reported at 23 Ben. Rev. Bd. Serv. (MB) 42. The decision and order of the administrative law judge (J.A. 68-95) is reported at 19 Ben. Rev. Bd. Serv. (MB) 457 (ALJ).

JURISDICTION

The judgment of the court of appeals was entered on March 29, 1991. The petition for a writ of certiorari was filed on June 27, 1991, and granted on December 9, 1991. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 33 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 933, is reprinted in the appendix to this brief (App., *infra*, 1a-5a).

STATEMENT

1. On July 20, 1983, Floyd Cowart sustained an injury to his hand while working on an oil drilling platform owned and operated by Transco Exploration Co. (Transco). J.A. 32, 42, 74. The platform was located on the Outer Continental Shelf. Cowart's disability claim was therefore governed by the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 *et seq.* See 43 U.S.C. 1333(b); J.A. 68-69. Cowart's employer, Nicklos Drilling Co. (Nicklos), through its insurer, Compass Insurance Co., paid him temporary totai disability benefits from July 21, 1983, through May 21, 1984. J.A. 33, 42, 75. Cowart was released to return to work in May 1984, but he was rated as having a 40% permanent partial disability. The Department of Labor notified Nicklos' carrier that Cowart was owed permanent partial disability compensation in the amount of $35,592.77, plus penalties and interest.[1] Nicklos, however, did not pay that compensation. J.A. 42, 76.

The LHWCA does not require a person entitled to compensation to elect between receiving compensation from his employer and seeking tort damages

[1] Section 14(a) of the LHWCA, 33 U.S.C. 914(a), requires an employer to pay compensation promptly without an award unless the claim is controverted. Section 14(e), 33 U.S.C. 914(e), increases an employer's liability by 10% if it does not pay or contest eligibility within 14 days of notice that compensation is due.

from a third party. 33 U.S.C. 933(a). Cowart thus filed a negligence action against Transco, the owner and operator of the drilling platform where his injury occurred. J.A. 32-33. On July 1, 1985, Cowart settled the action for $45,000. After paying attorney's fees and expenses, Cowart netted $29,350. J.A. 33, 76-77. Nicklos had prior notice of the settlement but did not give its written consent.[2] J.A. 77, 92.

2. After settling with Transco, Cowart filed an administrative claim with the Department of Labor. The claim sought the difference between the net amount of his settlement with Transco and the compensation he was due under the LHWCA, as well as future medical benefits and interest. See J.A. 33, 60-64, 93. He relied on Section 33(f) of the LHWCA, 33 U.S.C. 933(f),which provides that when a person entitled to compensation recovers damages from a third party who was liable for the employee's injuries or death, the employer is liable for compensation payments that exceed the net amount recovered from the third party. Although stipulating that Cowart was permanently partially disabled, J.A. 73, Nicklos contended that, under Section 33(g) of the LHWCA, 33 U.S.C. 933(g), Cowart's failure to obtain Nicklos' written consent to the settlement with Transco relieved Nicklos of its obligation to pay further compensation or medical benefits.[3] J.A. 70.

[2] Nicklos had agreed to indemnify Transco for its liability. See J.A. 49-50. Such an indemnification agreement, while generally not given effect under the LHWCA, is lawful with respect to injuries occurring on the Outer Continental Shelf. 33 U.S.C. 905(b) and (c).

[3] Section 33(g)(1) requires that the "person entitled to compensation" must obtain the prior written approval of the

The administrative law judge (ALJ) ordered Nicklos to pay benefits. The ALJ held that Nicklos' consent to the settlement was not necessary because the approval requirement under Section 33(g) applies to a claimant "[o]nly where an employer voluntarily pays compensation or where an award is entered." J.A. 84. Because Cowart was not receiving benefits at the time he executed the settlement and no award had been entered, the ALJ determined that he was not a "person entitled to compensation" within the meaning of 33 U.S.C. 933(g)(1) and was not required to obtain his employer's prior written approval of the settlement. J.A. 77-92.

The Benefits Review Board affirmed. J.A. 40-67. It noted that prior to the 1984 amendments to the LHWCA,[4] the Board had ruled that "a claimant was a 'person entitled to compensation' within the meaning of Section 33(g)" only "if [the] employer was paying benefits either voluntarily or pursuant to an award at the time of the third party settlement." J.A. 54-55, citing *O'Leary* v. *Southeast Stevedoring Co.*, 7 Ben. Rev. Bd. Serv. (MB) 144 (1977), aff'd mem., 622 F.2d 595 (9th Cir. 1980). If the claimant "was not receiving benefits," the Board stated, the prior approval requirement of Section 33(g) "did not apply." J.A. 55. The 1984 amendments added to the LHWCA Section 33(g)(2), 33 U.S.C. 933 (g)(2), which states in pertinent part that "[i]f

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employer and its carrier with respect to a settlement with a third party for less than the compensation that would be due. Section 33(g)(2) imposes the sanction of forfeiture of rights under the LHWCA for failure to obtain the required approval and to file it properly with the deputy commissioner. 33 U.S.C. 933(g)(1) and (2).

[4] See Pub. L. No. 98-426, § 21(d), 98 Stat. 1652 (1984).

no written approval of the settlement is obtained and filed as required by paragraph (1), * * * all rights to compensation and medical benefits under this chapter shall be terminated, regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this chapter." *In Dorsey* v. *Cooper Stevedoring Co.*, 18 Ben. Rev. Bd. Serv. (MB) 25 (1986), appeal dismissed, 826 F.2d 1011 (11th Cir. 1987), the Board held that, despite the 1984 amendments, the approval requirement applied only to claimants receiving or awarded benefits. Relying on *Dorsey*, the Board held that Cowart was therefore not required to obtain the employer's approval. J.A. 55-57.

3. Respondents sought review in the court of appeals. The Director, Office of Workers' Compensation Programs, appeared in the case as a respondent and defended the Board's decision. The court vacated the Board's decision and order. J.A. 30-39. The court stated that under Section 33(g), there are no exceptions to the "unqualified" requirement that an employer is liable for compensation that exceeds a third-party settlement only if the employer and its carrier give prior written approval to the third party settlement. J.A. 38. It therefore held that "future LHWCA benefits must be denied an employee who fails to obtain prior consent by his employer/carrier to the settlement of his claim against a third party tortfeasor." J.A. 32.

To resolve a conflict with its earlier unpublished decision in *Kahny* v. *OWCP*, 729 F.2d 777 (1984) (Table), the court of appeals granted suggestions for rehearing en banc filed by the Director and Cowart, and affirmed the panel decision. J.A. 3-4,

21.[5] The court held that Section 33(g) unambiguously requires an employer's prior written approval of all settlements for less than the compensation due, whether or not the claimant was receiving LHWCA compensation at the time of settlement. The court therefore refused to give deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to the Director's contrary interpretation. J.A. 13-16.

In rejecting the Director's view of the meaning of the phrase "person entitled to compensation," the court initially noted that there are no textual exceptions to the approval requirement in Section 33(g). J.A. 17. Next, the court pointed out that Section 33(g)(2) expressly states that benefits for noncompliance with the approval requirement are terminated "regardless of whether the employer * * * has made payments or acknowledged entitlement to benefits under this chapter," 33 U.S.C. 933(g)(2). That provision, the court stated, "squarely refutes" the Director's argument that the employer's actual payment of benefits was necessary for the employer to have the right of prior approval under Section 33(g). J.A. 18. Finally, the court concluded that the Director's reading of Section 33(g) was unnecessary to prevent financial hardship to claimants pursuing civil actions. Any such hardship on claim-

[5] In the same opinion, the en banc court of appeals considered another case raising the same issue and similarly affirmed the panel's decision vacating the Board's order. J.A. 6-7, 21. A petition for a writ of certiorari seeking review of that judgment is pending as *Barger* v. *Petroleum Helicopters, Inc.*, No. 91-284.

ants, the court indicated, was a "self-inflicted" result of their decision "to ignore their rights and responsibilities" under 33 U.S.C. 933(g). J.A. 18-19.

The court also rejected the Director's claim that his interpretation was necessary to give significance to the requirement in Section 33(g)(2), 33 U.S.C. 933(g)(2), that an employee must give notice to his employer of any settlement with or judgment against a third party—a requirement the Director thought would be rendered superfluous if the employer had to approve in advance settlements that were for less than the compensation entitlement. The court found that the notice requirement would not be rendered superfluous because it applies to judgments as well as to settlements, and also applies to settlements for *more* than the claimant's compensation entitlement, while the approval requirement applies only to settlements for *less* than the compensation entitlement. J.A. 19-20.

Three judges dissented. J.A. 22-29. They found the Director's interpretation of "person entitled to compensation" reasonable and entitled to deference. In particular, the dissent discerned no valid reason why an employee who has been denied compensation must "go hat in hand to the employer and request permission to settle his claim." J.A. 26. The dissent also found no evidence that Congress intended to overrule the Director's construction of the statute when it added Section 33(g)(2) in the 1984 LHWCA amendments; rather, the dissent interpreted the reenactment of the phrase "person entitled to compensation" as approval of prior interpretations of that phrase. The dissent also agreed with the Director that Section 33(g)(2)'s notification requirement "adds to the force of the Director's con-

struction" by requiring notification but not approval regardless of whether compensation is being paid. J.A. 28.

SUMMARY OF ARGUMENT

Section 33(g) of the LHWCA requires a "person entitled to compensation" to obtain the employer's prior, written approval of any settlement with a third party for an amount that is less than the LHWCA compensation benefits due. If he does not, he forfeits his rights to deficiency compensation and medical benefits under the LHWCA. 33 U.S.C. 933 (g). Because the claimant's third party recovery serves to offset the employer's compensation liability, the approval requirement "protects the employer against his employee's accepting too little for his cause of action against a third party." *Banks* v. *Chicago Grain Trimmers Ass'n*, 390 U.S. 459, 467 (1968). The court of appeals held that the phrase "person entitled to compensation" embraces all persons eligible for LHWCA benefits, whether or not they are receiving those benefits at the time of the third party settlement. Petitioner contends that Section 33(g)'s approval requirement is limited to claimants who are receiving benefits or who have been determined to be entitled to them. In our view, the court of appeals' interpretation is correct.[6]

A. The court of appeals' construction is based on the unambiguous language of the LHWCA. Section

[6] The Director sided with petitioner in the proceedings below. Prior to the panel's ruling, the interpretation advanced by the Director had been upheld in two unpublished decisions. See *O'Leary* v. *Southeast Stevedoring Co.*, 622 F.2d 595 (9th Cir. 1980) (Table); *Kahny* v. *OWCP*, 729 F.2d 777 (5th Cir. 1984) (Table). In light of the en banc decision in this case, the Department of Labor reexamined its views on the issue.

33(g)(1) applies to any "person entitled to compensation" who settles a third party claim for less than the compensation to which he "would be entitled"; actual receipt of payments is not a condition for application of the approval requirement. Section 33(g)(2) states that if the approval requirement under Section 33(g)(1) is not satisfied, "all rights to compensation and medical benefits under this chapter shall be terminated, regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this chapter." 33 U.S.C. 933(g)(2). The text makes clear that the approval requirement, and forfeiture sanction for failure to comply with it, apply to all eligible claimants who settle third party suits for less than the compensation due, whether or not they were receiving payments or held to be entitled to them at the time of the settlement. That reading of the statute is supported by Section 33 as a whole and by the use of the phrase "person entitled to compensation" in other parts of the LHWCA.

B. The legislative history confirms the natural reading of Section 33(g). As originally enacted in 1927, a "person entitled to compensation" under Section 33 would not be receiving benefits at the time of settlement because claimants were required to elect between compensation and tort remedies. Subsequent amendments abolished the election requirement, but gave no hint of excluding from the phrase "person entitled to compensation" claimants who were not being paid benefits at the time of a third party settlement.

In 1977, the Benefits Review Board ruled that the prior approval requirement in Section 33(g) did not apply to a claimant who had not been awarded and

was not being paid benefits at the time of settlement. In the early 1980s, bills were introduced that would have overruled the Board's construction. This legislative effort culminated in 1984, when Congress enacted a bill amending Section 33 to make clear that the approval requirement and the forfeiture sanction apply to a claimant "regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this chapter."

C. Finally, the policies of the LHWCA do not justify a departure from the statute's unambiguous text. This Court has held that the LHWCA should be construed to avoid needlessly harsh results for claimants, but that principle does not override the necessity to adhere to clear statutory language. Moreover, the LHWCA embodies a compromise between the interests of employers and claimants. The court of appeals' holding, by furthering the purpose of the approval requirement to protect employers against unreasonable third party settlements, is consistent with the balance struck in the text of Section 33(g).

ARGUMENT

A CLAIMANT FORFEITS HIS RIGHT TO FUTURE BENEFITS UNDER THE LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT BY FAILING TO OBTAIN HIS EMPLOYER'S PRIOR WRITTEN APPROVAL OF A SETTLEMENT WITH A THIRD PARTY FOR LESS THAN THE COMPENSATION DUE

The LHWCA sets forth a comprehensive scheme governing the entitlement of injured longshoremen and harbor workers to compensation and medical benefits. The statute uses the phrase "person entitled to compensation" in a general sense to identify the class of persons eligible for benefits under the LHWCA. In Section 33(g), the phrase describes the class of persons who must obtain the approval of the employer before reaching any settlement with a third party that would leave the employer liable for deficiency compensation payments. The court of appeals correctly held that Section 33(g)'s approval requirement applies to all eligible claimants who settle for less than the compensation due, regardless of whether they are actually receiving benefits or whether the employer has acknowledged their entitlement to benefits.

A. The Language Of Section 33 Indicates That A "Person Entitled To Compensation" Includes A Claimant Whether Or Not He Has Been Receiving Or Awarded Benefits

Section 33 of the LHWCA defines the relationship between the compensation liability of an employer and the right of a claimant to recover from a third party. 33 U.S.C. 933. Under Section 33(a), a "person entitled to [LHWCA] compensation" is not required to make an election of remedies between a

LHWCA workers' compensation remedy and a third party damages remedy. Under Section 33(f), if "the person entitled to compensation" recovers amounts from a third party because of a compensable injury or death, the employer "shall be required to pay as compensation" only the excess of the LHWCA compensation over the net amount recovered from the third party. Section 33(g) deals with compromises by the claimant of the third party action. Section 33(g)(1) provides:

> If the person entitled to compensation (or the person's representative) enters into a settlement with a third person * * * for an amount less than the compensation to which the person (or the person's representative) would be entitled under this chapter, the employer shall be liable for compensation as determined under subsection (f) of this section only if written approval of the settlement is obtained from the employer and the employer's carrier, before the settlement is executed, and by the person entitled to compensation (or the person's representative). The approval shall be made on a form provided by the Secretary and shall be filed in the office of the deputy commissioner within thirty days after the settlement is entered into.

Section 33(g)(2) explains the consequences of failing to obtain the employer's written approval.

> If no written approval of the settlement is obtained and filed as required by paragraph (1), or if the employee fails to notify the employer of any settlement obtained from or judgment rendered against a third person, all rights to compensation and medical benefits under this chapter shall be terminated, regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this chapter.

1. The unambiguous language of the LHWCA supports the court of appeals' conclusion that a "person entitled to compensation" means a person who is eligible for compensation under the requirements of the Act, whether or not he is receiving or has been awarded benefits at the time of settlement. Under Section 33(g)(1), the prior-approval requirement applies whenever "the person entitled to compensation * * * enters into a settlement with a third person * * * for an amount less than the compensation to which the person * * *would be entitled* under this chapter." 33 U.S.C. 933(g)(1) (emphasis added). The phrase "would be entitled" suggests applicability to a person who is not receiving LHWCA benefits, but who would be eligible for them.

Section 33(g)(2) confirms that the approval requirement is intended to apply to all eligible claimants who settle third party claims for less than the compensation due, without regard to whether they are receiving benefits at the time of settlement. The provision states:

> If no written approval of the settlement is obtained and filed as required by paragraph (1), * * * all rights to compensation and medical benefits under this chapter shall be terminated, *regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this chapter.*

33 U.S.C. 933(g)(2) (emphasis added). The provision clearly indicates that the approval requirement, and the forfeiture sanction for failing to satisfy it, are applicable to claimants "regardless

of whether" they are receiving benefits at the time of the settlement.

The use of the phrase "person entitled to compensation" in other parts of Section 33 also supports the view that the phrase includes claimants who are eligible for benefits as well as those who are actually being paid. Under Section 33(a), when there is an injury or death for which compensation "is payable," the claimant may also seek damages from a third party; the right to pursue a third party claim is not limited to persons who are actually being paid compensation.[7] Under Section 33(f), when a "person entitled to compensation" recovers from a third party, the employer is liable only for the excess of the compensation due over such recovery. The claimant's status as a "person entitled to compensation" under that provision does not turn on whether he was being paid benefits at the time of the third party recovery.[8]

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[7] Section 33(b), 33 U.S.C. 933(b) provides that if "the person entitled to compensation" accepts compensation under an administrative award and does not bring a claim against the third party within six months, the right to seek damages from the third party is assigned to the employer; if the employer fails to sue in 90 days, the claim reverts to the claimant. The "person entitled to compensation" covered by that provision thus is an actual recipient of benefits, but that is because Section 33(b) establishes an outer time limit for bringing suit before the right to sue is assigned as a matter of law for 90 days to the employer. A "person entitled to compensation" may also sue a third party before seeking benefits. 33 U.S.C. 933(a).

[8] If a person who was not receiving benefits at the time of the third party recovery were deemed not to be a "person entitled to compensation" under Section 33(f), it would allow double compensation for claimants who first recover from a third party and then obtain compensation under the LHWCA. The Board has rejected that possibility. See *Force* v. *Kaiser Aluminum and Chemical Corp.*, 23 Ben. Rev. Bd. Serv. (MB) 1, 4 (1989) (status as a "person entitled to compensation" under Section 33(f) does not depend on receiving benefits at the time of the third party recovery), aff'd in relevant part *sub nom. Force* v. *Director, OWCP*, 938 F.2d 981, 984 (9th Cir. 1991) (agreeing with the Director that "[t]he only relevant question is whether the claimant is impermissibly recovering twice for the same injury, regardless of when such payments occur"); see also S. Rep. No. 428, 86th Cong., 1st Sess. 2 (1959) (while a claimant need not elect between LHWCA compensation and seeking recovery from a third party, a claimant "would not be entitled to double compensation").

It is particularly appropriate to read the phrase "person entitled to compensation" as having the same meaning in both Section 33(f) and Section 33(g) because those provisions work in tandem to limit the employer's LHWCA liability when a third party has been or should have been held accountable.[9]

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[9] Section 33(f) explicitly makes the employer liable for compensation as offset by the amount of the third party recovery. As construed by the courts, the statute also gives the employer a lien on the third party recovery so that the employer can recoup benefits already paid. See *Bloomer* v. *Liberty Mut. Ins. Co.*, 445 U.S. 74, 80-81 & n.6 (1980); *Ochoa* v. *Employers Nat'l Ins. Co.*, 754 F.2d 1196, 1198 (5th Cir. 1985). Section 33(g) protects the employer's offset and lien interests by terminating the employer's deficiency liability under subsection (f) when the employer has not approved a settlement with the third party that the claimant may desire, but that may be unreasonably low. See *Banks* v. *Chicago Grain Trimmers Ass'n*, 390 U.S. 459, 467 (1968) (holding that acceptance of remittitur is not a "compromise" under Section 33(g); the provision "protects the employer against his employee's accepting too little for his cause of action against a third party" and "[t]hat danger is not present" when damages are set "by the independent evaluation of a trial judge"). In *Banks*, the employee had settled the third party action *before* the entry of the award of LHWCA compensation, 390 U.S. at 461, but there was no suggestion that Section 33(g) was inapplicable for that reason.

Moreover, the phrase "person entitled to compensation" is used elsewhere in the LHWCA to apply specifically to claimants who are not receiving benefits. For example, under Section 14(h), a deputy commissioner is required to conduct an investigation and to hold a hearing when "any person entitled to compensation" gives notice "in any case where right to compensation is controverted, or where payments of compensation have been stopped or suspended." 33 U.S.C. 914(h). That provision expressly treats a claimant who is *not* receiving benefits and who has *not* obtained an award as a "person entitled to compensation."

The "normal rule" is that "identical words used in different parts of the same act are intended to have the same meaning." *Sorenson* v. *Secretary of the Treasury*, 475 U.S. 851, 860 (1986); *Sullivan* v. *Stroop*, 110 S. Ct. 2499, 2504 (1990). That principle has been applied specifically in construing the LHWCA. *Morrison-Knudsen Constr. Co.* v. *Director, OWCP*, 461 U.S. 624, 633 (1983) ("Since we have often stated that a word is presumed to have the same meaning in all subsections of the same statute, * * * we would expect the term 'wages' to maintain the same meaning throughout the [LHWCA]."). The context in which the phrase "person entitled to compensation" is used throughout the Act, and in Section 33 in particular, indicates that it consistently covers claimants who are eligible for compensation, whether or not they are actually receiving it.

2. Petitioner acknowledges (Br. 4) that Cowart was "entitled" to receive compensation from his employer at the time he settled his third party claim. Petitioner nevertheless contends (Br. 6-7, 18-23) that the phrase "person entitled to compensation" in Section 33(g)(1) is limited to claimants receiving benefits or judicially determined to be entitled to them—the meaning the Board advanced before Congress added Section 33(g)(2) to the statute and then adhered to after the 1984 amendments. In so arguing, petitioner, like the Board, treats Section 33(g)(1) as entirely distinct from Section 33(g)(2).[10] That interpretation is untenable.

If the only individuals required to obtain employer approval were those to whom the employer had made payments or who had been determined to be entitled to benefits (as the Board had thought), it would have been pointless for Congress to state that the failure to obtain the required approval results in a forfeiture "regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this chapter." Under petitioner's reading of the statute, the only persons who could be subject to forfeiture for not obtaining approval were those receiving payments from the employer or found to be entitled to payments. Section 33(g)(2), however, clearly contemplates that the forfeiture sanction applies to all claimants who fail to get the required aproval whether or not payments had been made or entitlement acknowledged.[11]

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[10] See *Dorsey*, 18 Ben. Rev. Bd. Serv. at 29 ("We do not view this new phrase [the "regardless" clause] in subsection 33(g)(2) as modifying the written approval requirement of subsection 33(g)(1). Rather, we view subsections 33(g)(1) and 33(g)(2) of the amended Act as separate provisions applicable to separate situations").

[11] Petitioner also argues (Br. 20-22) that Congress intentionally referred to the individual required to give notice of a third party settlement or judgment as an "employee" in Section 33(g)(2) to distinguish him from a "person entitled to compensation" subject to the approval requirement in Section 33(g)(1). From that questionable premise, petitioner main-

Petitioner argues (Br. 20-23) that under Section 33(g), approval of a settlement is required when the claimant is receiving benefits, but only notice is required when the employee is not receiving benefits. He urges that if approval were required of both classes of claimants, the notice requirement would be superfluous. Not so. Section 33(g)(2) provides that if an employee fails to give notice of any settlement or judgment with a third person, the sanction of forfeiture of rights under the statute is applicable. 33 U.S.C. 933(g)(2). On its face, the notification requirement applies to *all* settlements, whereas the approval requirement applies only to settlements for less than the LHWCA compensation entitlement. 33 U.S.C. 933(g)(1). Accordingly, notice (but not approval) is required when the settlement is for more than the LHWCA compensation entitlement.[12]

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tains that Congress intended to preserve the Board's earlier definition of the phrase "person entitled to compensation." That contention is unfounded. The "regardless" clause applies both to an "employee" who fails to give notice and a "person entitled to compensation" who fails to obtain approval. It therefore reflects Congress's intention that a "person entitled to compensation" can become subject to forfeiture under Section 33(g)(2) "regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this chapter."

[12] The forfeiture sanction would not be meaningless for a claimant who fails to give notice of a settlement for more than the LHWCA compensation. Even though such a claimant would not be entitled to further compensation payments, the employee who fails to give notice would forfeit his entitlement to future medical benefits. See *Bethlehem Steel Corp.* v. *Mobley*, 920 F.2d 558 (9th Cir. 1990). In addition, notice (but not approval) of a settlement may be required when a claimant's full third-party settlement is worth more than the LHWCA compensation, but the net settlement (after deducting reasonable expenses and attorneys' fees, 33 U.S.C. 933(f)) is worth less. The forfeiture sanction applied to such a claimant would terminate deficiency compensation rights as well as medical benefits. Although petitioner is such a claimant, petitioner has not contended that employer approval was not required for that reason.

At bottom, petitioner's argument simply rewrites the statute to say that Section 33(g) requires "*written approval* from an employer who was *paying* compensation; and only *notification* to an employer who was *not paying* compensation." Pet. Br. 10 (emphasis in original). The LHWCA, however, does not say this. The court of appeals was therefore correct in concluding that the language of Section 33 is unambiguous in requiring claimants to obtain employer approval of settlements with third parties for less than the compensation due, regardless of whether the employer has actually paid benefits or acknowledged the claimant's entitlement to benefits at the time of the settlement.

B. The Legislative History Confirms That Section 33(g)'s Approval Requirement Applies To All Claimants Who Compromise Third-Party Claims For Less Than The Compensation Due

Because Section 33(g) unambiguously requires claimants to obtain prior written approval of settlements whether or not they are being paid compensation at the time, there is a "'strong presumption' that the plain language of the statute expresses congressional intent," which "is rebutted only in 'rare and exceptional circumstances,' * * * when a contrary legislative intent is clearly expressed." *Ardestani* v. *INS*, 112 S. Ct. 515, 520 (1991); *King* v. *St. Vincent's Hosp.*, 112 S. Ct. 570, 575 n.14 (1991) ("When we find the terms of a statute unambiguous,

judicial inquiry is complete, except in rare and exceptional circumstances."). Although resort to legislative history is unnecessary here, that history in fact confirms the construction of Section 33(g) suggested by the plain language of the statute.

1. *The History of the LHWCA Before the 1984 Amendments Does Not Support a Narrow Construction of the Phrase "Person Entitled To Compensation"*

The LHWCA was enacted in 1927. Act of Mar. 4, 1927, ch. 509, 44 Stat. 1424. It initially required a "person entitled to compensation" to elect between accepting compensation and seeking damages from a third party. Section 33(a), 44 Stat. 1440. Acceptance of compensation resulted in an automatic assignment of the claimant's rights against the third party to the employer. Section 33(b), 44 Stat. 1440. If the "person entitled to compensation" did sue a third party, he retained the right to be paid compensation by the employer in excess of the third party recovery. Section 33(f), 44 Stat. 1441. However, if the "person entitled to compensation" compromised the third party action for less than the compensation due, the employer remained liable "only if such compromise is made with his written approval." Section 33(g), 44 Stat. 1441. See *American Stevedores, Inc.* v. *Porello*, 330 U.S. 446, 454 n.18 (1947). Because of the election requirement, the claimant who settled such a case could not be receiving compensation while he was suing a third party. Accordingly, a "person entitled to compensation" under Section 33 originally included only those claimants who were not receiving compensation.

Because the LHWCA was modeled on New York's workers' compensation law, *Banks* v. *Chicago Grain Trimmers Ass'n*, 390 U.S. 459, 466 (1968), this

Court has sometimes consulted New York authority in interpreting the LHWCA. See, *e.g.*, *Potomac Elec. Power Co.* v. *Director, OWCP*, 449 U.S. 268, 275 (1980). Under the New York analogue to Section 33 of the LHWCA, see 1922 N.Y. Laws ch. 615, § 29, as amended by 1924 N.Y. Laws ch. 499, the requirement of employer approval of a third party settlement was excused in some cases where the employer had controverted the claimant's entitlement to compensation.[13] Although those decisions are consistent with petitioner's approach in this case, they were not based on a construction of the phrase "person entitled to compensation," and there is no evidence that Congress was aware of them. Moreover, the New York authorities rested on the theory that estoppel could bar an employer from relying on his failure to give approval. Congress rejected estoppel theories under Section 33(g) in the 1972 amendments to the LHWCA (see pp. 22-23, *infra*).

In 1959, Congress abolished the requirement that an LHWCA claimant must elect between receiving compensation and pursuing a claim against a third party. Pub. L. No. 86-171, 73 Stat. 391 (1959).[14]

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[13] See *Beekman* v. *W.A. Brodie, Inc.*, 249 N.Y. 175, 176, 163 N.E. 298, 298 (1928) (employer was estopped from asserting the right to written consent "when it disclaimed liability and advised the employee to settle his case with the third party"); *State of New York Dep't of Labor Special Bulletin* No. 156, at 276 (Jan. 1927-Aug. 1928) (state agency ruled that a carrier who disclaimed interest in the third party case could not later object to the amount of the settlement), aff'd mem. *Clow* v. *B.F. Keith's Fordham Theater*, 221 A.D. 826, 224 N.Y.S. 774 (1927), aff'd mem., 247 N.Y. 583, 161 N.E. 191 (1928).

[14] Congress had previously limited the election requirement to cases in which compensation was being paid pursuant to an award by a deputy commissioner. Act of June 25, 1938, ch. 685,

That change was designed to relieve the "hardship" faced by injured employees whose need to meet immediate expenses led them to accept compensation rather than pursue an uncertain recovery in a third party lawsuit. S. Rep. No. 428, 86th Cong., 1st Sess. 2 (1959). Although the 1959 amendments permitted the employee to take compensation while suing a third party, they did not restrict to that one situation the requirement that an employer must approve third party settlements for less than the compensation due.[15]

In 1972, the LHWCA was extensively amended. Pub. L. No. 92-576, 86 Stat. 1251. One of the provisions amended Section 33(g) to overrule decisions that had applied an estoppel theory to prevent em-

§§ 12, 13, 52 Stat. 1168. See *Bloomer* v. *Liberty Mut. Ins. Co.*, 445 U.S. at 79-81 (describing 1938 and 1959 amendments).

[15] Petitioner argues (Br. 11-14) that the intent of the 1959 amendments would be frustrated if employer approval of settlements were required when the employer is not paying benefits. Petitioner claims that such a rule would allow an employer who was not paying benefits to withhold approval of a settlement for less than the compensation due; the claimant would nevertheless be forced to accept the settlement because of the need for funds to meet daily expenses. Br. 14-15. It is not true, however, that whenever the employer is not paying compensation benefits, the claimant will be forced to settle a third party claim because of an immediate need for funds. In this case, for example, Cowart initially received temporary disability payments and later returned to work before settling his third party claim. There is no suggestion that his settlement was compelled by pressing financial needs. Moreover, there is no evidence that Congress believed that the difficulties petitioner foresees would in fact flow from the approval requirement; the Senate report assumed that an employee's "compensation under the act is certain." S. Rep. No. 428, *supra*, at 2. See also *Bloomer* v. *Liberty Mut. Ins. Co.*, 445 U.S. at 86 ("The compensation award was intended to be an immediate and readily available payment to the injured longshoreman.").

ployers from relying on the approval requirement when they had not in fact given written approval of a third party settlement. § 15(h), 86 Stat. 1262.[16] In rejecting such holdings, the committee reports explained that the "amendment makes it clear precisely what written approval the person entitled to benefits must obtain and file with the deputy commissioner." S. Rep. No. 1125, 92 Cong., 2d Sess. 14 (1972); H.R. Rep. No. 1441, 92d Cong., 2d Sess. 12 (1972). See *Devine* v. *National Creative Growth, Inc.*, 16 Ben. Rev. Bd. Serv. (MB) 147, 152-153 (1982) (amendment was "intended to preclude application of estoppel, substantial compliance, and similar theories to avoid the effect of non-compliance with Section 33(g)").[17] The amendment thus strengthened the requirement of employer approval of settlements for less than the amount of the LHWCA liability; it does

[16] Before the 1972 amendments, the LHWCA stated that the employer would be liable "only if such compromise is made with [the employer's] written approval." 33 U.S.C. 933(g) (1970). The 1972 amendments provided that written approval had to be "obtained from the employer and its insurance carrier by the person entitled to compensation or such representative at the time of or prior to such compromise on a form provided by the Secretary and filed in the office of the deputy commissioner having jurisdiction of such injury or death within thirty days after such compromise is made." Pub. L. No. 92-576, § 15(h), 86 Stat. 1262.

[17] In *Devine*, the Board held that the fact that the carrier for the workers' compensation claim had participated in the settlement of the third party action and had executed the settlement agreement did not render the formalities of Section 33(g) inapplicable. In *ITO Corp.* v. *Sellman*, No. 90-1531 (4th Cir. Jan. 22, 1992), which presented similar facts to those in *Devine*, the court upheld the Board's decision that Section 33(g) was inapplicable. This case does not involve the issue addressed in *Devine* and *ITO Corp.*

not support a reading of Section 33 that would exclude claimants who are not receiving compensation at the time of the settlement.

2. *The 1984 Amendments Applied the Approval Requirement and Forfeiture Sanction to a Settling Claimant Regardless of Whether the Employer Had Made Payments or Acknowledged Entitlement to Benefits*

a. Following the 1972 amendments, the Benefits Review Board ruled that the prior approval requirement of Section 33(g) did not apply to a claimant who was not receiving benefits under the Act when he settled a third party claim. In *O'Leary* v. *Southeast Stevedoring Co.*, 7 Ben. Rev. Bd. Serv. (MB) 144 (1977), aff'd mem., 622 F.2d 595 (9th Cir. 1980), the Board acknowledged that the 1972 amendments were designed to "strengthen" the approval requirement, 7 Ben. Rev. Bd. Serv. at 147, but nevertheless held that the LHWCA envisioned that an employer would be making payments (or would have been found liable to do so by a judicial determination) in order to derive rights under Section 33. *Id.* at 148. The Board explained that a contrary interpretation

> could result in a claimant not being paid any compensation, yet the claimant would be afraid to make a third party settlement for in so doing he might waive his rights to compensation under the Act. Ultimately, a claimant going without income for a long enough time could be forced into a third party settlement without [the] employer's consent to obtain money (the Act providing no procedure for waiving employer's consent unlike some state acts).

Id. at 149. The Board stated that "Congress by requiring written consent could not have contemplated such a result." *Ibid.*

b. The LHWCA was amended again in 1984. Pub. L. No. 98-426, 98 Stat. 1639 (1984). The major impetus for the 1984 amendments was employer dissatisfaction with the LHWCA. See, *e.g.*, *Oversight Hearings on the Longshoremen's and Harbor Workers' Compensation Act: Hearings before the Subcomm. on Labor Standards of the House Comm. on Education and Labor*, 96th Cong., 1st Sess. (1979) [hereinafter *House Hearings*].

The first version of Section 33(g)(2) seems to have appeared shortly after the Ninth Circuit's unpublished affirmance in *O'Leary*. See H.R. 7610, § 21(c), 96th Cong., 2d Sess. (1980), *reprinted in* Supplement to *House Hearings*, *supra*, at 43-44.[18] Representative Erlenborn, the sponsor of this bill and a critic of the Longshore program, see 126 Cong. Rec. 15,438 (1980), explained the amendment as

> Requiring an employee, who enters into a settlement with a third party for an amount less than compensation otherwise payable, to obtain the employer's and carrier's approval; [and]
>
> Relieving the employer of his obligations to pay future compensation where a settlement is reached and the employee fails to inform, and win the approval of, the employer-carrier of such settlement, or where the employee fails to notify the employer of any third party judgment in his favor.

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[18] The bill provided that "[i]f no written approval of the settlement is obtained and filed as required by paragraph (1) [Section 33(g)(1)], or if the employee fails to notify the employer of any judgment obtained from a third person, and regardless of whether the employer or its insurer has made payments or acknowledged entitlement to the benefits of this Act, all rights to compensation under this Act shall be terminated."

Supplement to *House Hearings*, *supra*, at 56. "The thrust of [the] amendments to subsection (g)," according to Representative Erlenborn, "is to preserve the employers' compensation lien on amounts received from a third party, where the employee either enters into a secret settlement with the third party or fails to notify the employer of a third party award." *Ibid.* The language of the proposed bill had the effect of overruling *O'Leary*.

In 1981, an identical amendment to Section 33(g) was introduced in the Senate. See 127 Cong. Rec. 9835 (1981). In a hearing on that bill, the Chairman of the Benefits Review Board specifically brought to the legislators' attention the holding of *O'Leary* that "the approval of the employer is not required if employer has refused to pay any compensation under the Act." The Chairman observed that the bill under consideration would reverse that result by requiring approval "even if employer has refused to pay claimant any compensation" and that this could "lead to injustice." *Longshoremen's and Harbor Workers' Compensation Act Amendments of 1981: Hearings on S. 1182 before the Subcomm. on Labor of the Senate Comm. on Labor and Human Resources*, 97th Cong., 1st Sess. 209, 210 (1981) (statement of Samuel Smith) [hereinafter *Senate Hearings*]. The Chairman did not defend *O'Leary*, however, but suggested that Congress should provide for approval of settlements by "an impartial party, such as the deputy commissioner." *Id.* at 210-211.[19]

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[19] A claimants' representative urged Congress to *change* the existing law to ensure that a claimant need not obtain employer approval of a third party settlement when the employer refuses to pay compensation. See *Senate Hearings*, *supra*, at 396 (Thomas Gleason, president of the International Longshoremen's Association, criticized "the present enactment," stating that "[a] more realistic amendment is needed to provide that if the employer refuses to pay, then the claimant can settle with the third party without employer authorization"); see also *Oversight on the Longshoremen's and Harbor Workers' Compensation Act, 1980: Hearing Before the Senate Comm. on Labor and Human Resources*, 96th Cong., 2d Sess. 383 (1980) (same). It is unclear whether the claimants' spokesman realized that *O'Leary* provided for that result; in any event, no language was adopted to achieve the result the claimants desired.

Instead of adopting the Chairman's suggestion, the Senate subcommittee tightened the amendment to Section 33(g) to clarify the breadth of the forfeiture provision.[20] The Senate Report explained that the amendment would "assure that all entitlement to compensation and other benefits otherwise available under this Act is forfeited whenever a third-party action is resolved without the employer's formal written approval." S. Rep. No. 498, 97th Cong., 2d Sess. 44 (1982). The Senate passed that provision without debate, 128 Cong. Rec. 18,019, 18,023 (1982), but the bill died in the House.

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[20] The revised bill changed the language of S. 1182 as introduced (quoted in note 18, *supra*) in three ways. See S. 1182, § 19(c), 128 Cong. Rec. 18,023 (1982). First, it moved the "regardless" clause to the end of Section 33(g)(2)—removing any doubt that the "regardless" clause applied both to failures to meet the notice requirement and to failures to meet the approval requirement. Second, it required notification of "any settlement" as well as of any judgment. Third, it provided that rights to medical benefits as well as to compensation would be forfeited. The relocation of the "regardless" clause is inconsistent with any suggestion that Congress intended to preserve *O'Leary* by applying the notification requirement to settlements. The revised bill's language is identical to Section 33(g)(2) as enacted.

In 1983, the Senate again passed legislation that incorporated the language amending Section 33(g). In 1984, the House followed suit. See 129 Cong. Rec. 16,248, 16,251 (1983); 130 Cong. Rec. 8317, 8321, 8515 (1984). The House Report explained that the change ensured that "if a claimant who has brought a cause of action against a third party enters into a settlement in an amount less than the amount to which the claimant would be entitled under the Longshore Act, the employer shall be responsible for additional compensation only if the employer has approved the settlement agreement." H.R. Rep. No. 570, 98th Cong., 1st Sess. Pt. 1, at 30-31 (1983).[21]

c. This legislative record provides no support for petitioner's theory (Br. 23) that Congress intended "to retain" *O'Leary's* definition of "person entitled to compensation" when it reenacted that phrase in 1984.[22] Congress did not "re-enact[] a statute with-

[21] The Senate Report repeated the explanation of the amendment given in S. Rep. No. 498, *supra*, at 44. See S. Rep. No. 81, 98th Cong., 1st Sess. 45 (1983). There was no floor debate on the provision, and the Conference Report is unenlightening. See H.R. Conf. Rep. No. 1027, 98th Cong., 2d Sess. 36 (1984) (in discussing other changes to Section 33, the Senate bill is summarized as "terminat[ing] the employer's liability for payment of compensation and medical benefits if the employee fails to notify the employer of any settlement obtained from a [*sic*] judgment rendered against a third party").

[22] When Congress acted, the *O'Leary* construction had been upheld in only two judicial decisions, both of which were unpublished. See *O'Leary*, *supra*; *Kahny* v. *OWCP*, *supra*. There is no basis for interpreting Congress's reenactment as automatic endorsement of that rarely litigated construction. Cf. *United States* v. *Mendoza-Lopez*, 481 U.S. 828, 836 (1987) ("[W]hile there was, at the time of the enactment * * *, some case law suggesting that a collateral attack on a deportation proceeding might under certain circumstances be permitted, that principle was not so unequivocally established as to persuade us that Congress must have intended to incorporate that prior law into [the statute]."). Moreover, *O'Leary's* reading of the phrase "person entitled to compensation" was, at the very least, in tension with the text of the LHWCA. When an administrative construction is contrary to the statutory text, a "subsequent re-enactment does not constitute an adoption of a previous administrative construction." *Demarest* v. *Manspeaker*, 111 S. Ct. 599, 603 (1991).

out change," *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978), when it amended Section 33(g) in 1984. Rather, it substantially changed that section—with the effect of clarifying that the forfeiture sanction for failing to obtain employer approval applies "regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this chapter." 33 U.S.C. 933 (g)(2). The explanation given for that change suggests that the approval requirement was understood as applying to *all* eligible claimants who settle third party actions for less than the compensation due.

A Department of Labor regulation implementing the 1984 amendments reflects the same reading of the statute. The regulation states that the employer's prior written approval is required when a "claim or legal action instituted against a third party results in a settlement agreement which is for an amount less than the compensation to which a person would be entitled" under the LHWCA, and that failure to obtain that approval "relieves the employer * * * of liability for compensation * * * and for medical benefits otherwise due * * *, regardless of whether the employer or carrier has made payments o[r] acknowledged entitlement to benefits under the Act." 20 C.F.R. 702.281(b). The regulation accords with

the interpretation adopted by the court of appeals. While the Board has adhered to its *O'Leary* ruling despite the 1984 amendments, see J.A. 54-57, and the Director had endorsed its rulings, "the Benefits Review Board is not a policymaking agency; its interpretation of the LHWCA thus is not entitled to any special deference from the courts." *Potomac Elec. Power Co.* v. *Director, OWCP*, 449 U.S. at 278 n.18; cf. *Martin* v. *Occupational Safety and Health Review Comm'n*, 111 S. Ct. 1171 (1991).[23]

In sum, before Congress amended Section 33 in 1984, legislators were told that the proposed bill would overrule *O'Leary*. The amendment was nevertheless passed with language that clarified that consequence. In light of that history, there is no basis for substituting the Board's construction of Section 33(g) in *O'Leary* for the language that Congress enacted.

C. The Policies Underlying The Longshore Act Are Consistent With The Court of Appeals' Holding

O'Leary's holding was grounded in a policy concern: the Board sought to avoid the potential hardship to claimants if an employer contested its LHWCA liability, yet refused to consent to the claimant's effort to settle a third party claim. That

[23] The Director, who does have policymaking responsibility, issued a circular (through his designee) to all district compensation offices stating that he would support as "a rational approach" the Board's view that under Section 33(g), a "person entitled to compensation" is a person receiving LHWCA compensation at the time of a third party settlement. The circular acknowledged, however, that "the Board's position may not be totally consistent with the amended language of Section 33(g)." See LHWCA Circular No. 86-3, at 1 (May 30, 1986).

possibility is a legitimate source of concern, but it does not justify departure from the statute's unambiguous text. Moreover, the court of appeals' reading of the statute is consistent with the primary purpose of Section 33(g)—to protect an employer against an unreasonably low settlement by a claimant.

1. *The Longshore Act's Policies Do Not Justify Disregarding Clear Statutory Language*

This Court has noted that because the LHWCA's basic goal is to provide compensation to injured workers, it "must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results." *Voris* v. *Eikel*, 346 U.S. 328, 333 (1953); accord *Director, OWCP* v. *Perini North River Assoc.*, 459 U.S. 297, 315-316 (1983); *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 268 (1977). That principle is applicable to Section 33(g). See *Bell* v. *O'Hearne*, 284 F.2d 777, 781 (4th Cir. 1960) ("In the absence of language plainly demanding it, a construction [of Section 33(g)] is not to be favored which visits a forfeiture on the employee or his dependent and gives a windfall to the insurance carrier.").

No statute, however, pursues its principal purpose at all costs; each statute reflects compromises embodied in the language of the law. See *Pension Benefit Guaranty Corp.* v. *LTV Corp.*, 110 S. Ct. 2668, 2676 (1990). "Invocation of the 'plain purpose' of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents the effectuation of congressional intent." *Board of Governors, Federal Reserve System* v. *Dimension Financial*

Corp., 474 U.S. 361, 374 (1986). For that reason, the Court has remarked that "the wisest course [in construing the LHWCA] is to adhere closely to what Congress has written." *Rodriguez* v. *Compass Shipping Co.*, 451 U.S. 596, 617 (1981).

2. *The Court of Appeals' Application of the Approval Requirement Accords with the Balance of Competing Policies Reflected in the Statute*

The court of appeals' interpretation is consistent with the compromises underlying the Longshore Act. The LHWCA is "not a simple remedial statute intended for the benefit of the workers. Rather, it was designed to strike a balance between the concerns of the longshoremen and harbor workers on the one hand, and their employers on the other." *Morrison-Knudsen Constr. Co.* v. *Director, OWCP*, 461 U.S. at 636; *Potomac Elec. Power Co.* v. *Director, OWCP*, 449 U.S. at 282 ("the LHWCA represents a compromise between the competing interests of disabled laborers and their employers"). Like other parts of the LHWCA, Section 33 embodies such a balance.

Section 33 furthers the claimant's interest in recovering from a third party by providing that a person entitled to compensation does not have to elect between a tort remedy and a compensation remedy, but may pursue both. It protects the employer's interest by providing a lien on the net third-party recovery so that the employer may recoup compensation already paid, see note 9, *supra*; by reducing the employer's liability by the amount of the net third party recovery; and by providing that a claimant's settlement of a suit against a third party for less than the amount of compensation requires employer approval.

As this Court has explained, the approval requirement "protects the employer against his employee's accepting too little for his cause of action against a third party." *Banks* v. *Chicago Grain Trimmers Ass'n*, 390 U.S. at 467; see also *Morauer & Hartzell, Inc.* v. *Woodworth*, 439 F.2d 550, 552 (D.C. Cir. 1970) (per curiam) (approval requirement protects against prejudice to the employer), cert. dismissed, 404 U.S. 16 (1971); *Bell* v. *O'Hearne*, 284 F.2d at 780 ("It is the evident purpose of the provision to prevent an employee or his beneficiaries to manage independently the course of pending litigation or to affect prospective litigation that is designed for the use of the employer as well as the employee or his dependents."); *Dorsey* v. *Cooper Stevedoring Co.*, 18 Ben. Rev. Bd. Serv. (MB) 25, 27-28 (1986) ("The purposes of Section 33(g) are to ensure that employer's rights are protected in a third party settlement and to prevent claimant from unilaterally bargaining away funds to which employer or its carrier might be entitled under 33 U.S.C. § 933(b)-(f)."), appeal dismissed, 826 F.2d 1011 (11th Cir. 1987).

The court of appeals' construction of Section 33(g) furthers that purpose. If the phrase "person entitled to compensation" were limited to those claimants who were already receiving compensation at the time of the settlement, it would deny the right of prior approval of settlements with third parties to those employers who exercise their statutory right to controvert liability. See 33 U.S.C. 914(a). It would also deny that protection to employers who were not notified of a compensable death or injury before the claimant settled the claim against the third party.[24] Application of the approval require-

[24] In certain occupational disease cases, employees or their survivors need not notify the employer of a compensable

ment to eligible claimants, regardless of whether they are actually being paid, thus furthers the employer-protection goal of the approval provision.

This is not to deny that there are situations in which the court's construction will lead to hardship for claimants. As the Board suggested in *O'Leary*, some claimants may be compelled by pressing financial needs to accept third party settlements without employer consent, and thereby lose their rights to compensation.[25] Employers who are not paying benefits may withhold consent for reasons other than the desire to prevent an unreasonably low settlement. See 2A A. Larson, *The Law of Workmen's Compensation* § 74.17(d), at 14-420 (1990) (recognizing the possibility that employers may unreasonably refuse to approve claimants' tort settlements).[26]

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death or injury until a year after they become aware of the relationship between the employment, the disease, and the death or injury. 33 U.S.C. 912(a).

[25] The LHWCA does, however, provide incentives for an employer to pay benefits promptly. An employer is required to pay compensation without an award, and its liability is increased by 10% if it does not pay or contest eligibility within 14 days of notice of death or disabling injury. 33 U.S.C. 914(a) and (e). If the employer contests, the claimant may file a claim and, if successful obtain an award from a deputy commissioner, or, if a hearing is held, from an ALJ. 33 U.S.C. 919. Those awards may be enforced in district court. 33 U.S.C. 918. If the employer does not pay an award within ten days after it becomes due, the employer's liability is increased by 20%, unless the Board or a court stays payment. 33 U.S.C. 914(f). Stays are not granted unless the employer establishes that payment will take all of its property or will render it incapable of carrying out its business—a difficult standard to meet. See *Rivere* v. *Offshore Painting Contractors*, 872 F.2d 1187, 1191 (5th Cir. 1989).

[26] This problem exists even when an employer is paying compensation. See *Pinell* v. *Patterson Service*, 22 Ben. Rev. Bd. Serv. (MB) 61, 65-66 (1989) (noting employer's "blanket policy of withholding written approval of third party settlements in order to avoid any further liability under the Longshore Act"). The solution to that problem suggested by Chairman Smith during the Senate subcommittee hearings, which is comparable to the solution adopted by some States, see 2A A. Larson, *supra*, § 74.17(d), at 14-420 to 14-422, is to have a neutral party (such as a deputy commissioner) determine whether a settlement is reasonable and should be authorized. *Senate Hearings*, *supra*, at 210-211; see also *Longshoremen's and Harbor Workers Compensation Act: Hearing Before the Subcomm. on Labor Standards of the House Comm. on Education and Labor*, 97th Cong., 2d Sess. 90 (1982) (claimants' spokesman urged that "[w]here the employer and claimant are unable to reach an agreement that the settlement is reasonable the trial court should be given the opportunity to make a determination as to whether or not the settlement is reasonable and to approve it even over the employer's objections"). Congress, however, has not adopted that approach.

Other difficulties may arise in occupational disease cases. See Postol, *The Federal Solution to Occupational Disease Claims—The Longshore Act and Proposed Federal Programs*, 21 Tort & Ins. L.J. 199, 228, 231 (1986). Occupational disease litigation is often complex and costly, and it may involve multiple third-party defendants with limited assets. *See, e.g.*, *In re Asbestos Prods. Liab. Litig. (No. VI)*, 771 F. Supp. 415, 419 (J.P.M.L. 1991). Claimants in such cases frequently settle some claims for relatively small amounts that are less than the compensation available under the LHWCA.[27] Although employer approval is required for those settlements, some

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[27] See, *e.g.*, *Blake* v. *Bethlehem Steel Corp.*, 21 Ben. Rev. Bd. Serv. (MB) 49, 51 & n.1 (1988) (settlements net $5,000 to $6,000); *Wilson* v. *Triple A Machine Shop*, 17 Ben. Rev. Bd. Serv. (MB) 471, 472 (ALJ) (1985) (settlements ranging from $750 to $15,000).

claimants may have difficulty even identifying the employer whose consent is required.[28]

These difficulties are admittedly cause for concern, but they do not justify a departure from the clear language of the statute. Some of those difficulties are tempered by a variety of restrictions on the applicability of Section 33(g), which are not at issue in this case.[29] And although occupational disease

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[28] Under the LHWCA, compensation is payable for disability, defined as inability because of injury to earn wages. 33 U.S.C. 902(10). Under the "last employer" rule, applicable to occupational disease cases, full liability for compensation falls on the last employer to expose the employee to substances causing the disability. See *Port of Portland* v. *Director, OWCP*, 932 F.2d 836, 840 (9th Cir. 1991). It is thus possible for a transient employee to become exposed to disease-causing materials while working for one employer, settle a third-party suit arising out of that exposure, and not become disabled and entitled to LHWCA compensation until he suffers further injurious exposure with a yet unknown future employer. A strict application of Section 33(g) could foreclose the employee from receiving LHWCA compensation because of his failure to secure approval of the earlier settlement from that future employer.

[29] For example, claimants will not be subject to Section 33(g)'s approval requirement if they resolve their third-party cases other than through a compromise. See *Banks*, 390 U.S. at 467 (order of remittitur is a judicial determination of recoverable damages, not an agreement subject to Section 33(g)); cf. *Morauer & Hartzell, Inc.* v. *Woodworth*, 439 F.2d at 553 (consent judgment that "was not the result of the judge's independent finding of the value of the claim after full presentation of the evidence, but was at most an informal exploratory attempt to determine the possibilities for private settlement," is subject to Section 33(g)'s approval requirement). In addition, the settlement of a third party claim before the employee becomes disabled may not be subject to the prior approval requirement. See *Bethlehem Steel Corp* v. *Mobley*, 920 F.2d at 560. Finally, employers cannot convert the shield of Section 33(g) into a sword against claimants to recover, after an unconsented third-party settlement, benefits previously paid. See *Stevedoring Servs. of America, Inc.* v. *Eggert*, No. 90-35015 (9th Cir. Jan. 9, 1992).

claimants face many obstacles in recovering against third parties, those difficulties are balanced by provisions, enacted in 1984, that make it easier for such claimants to recover LHWCA benefits.[30]

In the end, Congress's accommodation of these conflicting considerations should not be disturbed by the agency or the courts to correct perceived mistaken policy choices where, as here, "Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842; *Potomac Elec. Power Co.* v. *Director, OWCP*, 449 U.S. 268, 280 (1980) (submission that a construction of the Act would "produce anomalous results that Congress probably did not intend * * * has insufficient force to overcome the plain language of the statute itself"). If modification of Section 33(g) is appropriate, the body to make that change is Congress.

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[30] See Pub. L. No. 98-426, §§ 10-12, 98 Stat. 1647-1649 (1984) (special compensation provisions for such claimants, including retirees, and extended time limits for filing LHWCA claims).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

MARSHALL J. BREGER
Solicitor of Labor

MAUREEN E. MAHONEY
Deputy Solicitor General

ALLEN H. FELDMAN
Associate Solicitor

MICHAEL R. DREEBEN
Assistant to the Solicitor General

STEVEN J. MANDEL
Deputy Associate Solicitor

EDWARD D. SIEGER
Attorney
Department of Labor

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APPENDIX

33 U.S.C. 933 provides:

Compensation for injuries where third persons are liable

(a) Election of remedies

If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person.

(b) Acceptance of compensation operating as assignment

Acceptance of compensation under an award in a compensation order filed by the deputy commissioner, an administrative law judge, or the Board shall operate as an assignment to the employer of all rights of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such acceptance. If the employer fails to commence an action against such third person within ninety days after the cause of action is assigned under this section, the right to bring such action shall revert to the person entitled to compensation. For the purpose of this subsection, the term "award" with respect to a compensation order means a formal order issued by the deputy commissioner, an administrative law judge, or Board.

(c) Payment into section 944 fund operating as assignment

The payment of such compensation into the fund established in section 944 of this title shall operate as an assignment to the employer of all right of the legal representative of the deceased (hereinafter referred to as "representative") to recover damages against such third person.

(d) Institution of proceedings or compromise by assignee

Such employer on account of such assignment may either institute proceedings for the recovery of such damages or may compromise with such third person either without or after instituting such proceeding.

(e) Recoveries by assignee

Any amount recovered by such employer on account of such assignment, shall be distributed as follows:

(1) The employer shall retain an amount equal to—

(A) the expenses incurred by him in respect to such proceedings or compromise (including a reasonable attorney's fee as determined by the deputy commissioner or Board);

(B) the cost of all benefits actually furnished by him to the employee under section 907 of this title;

(C) all amounts paid as compensation;

(D) the present value of all amounts thereafter payable as compensation, such present

value to be computed in accordance with a schedule prepared by the Secretary, and the present value of the cost of all benefits thereafter to be furnished under section 907 of this title, to be estimated by the deputy commissioner, and the amounts so computed and estimated to be retained by the employer as a trust fund to pay such compensation and the cost of such benefits as they become due, and to pay any sum finally remaining in excess thereof to the person entitled to compensation or to the representative; and

(2) the employer shall pay any excess to the person entitled to compensation or to the representative.

(f) Institution of proceedings by person entitled to compensation

If the person entitled to compensation institutes proceedings within the period prescribed in subsection (b) of this section the employer shall be required to pay as compensation under this chapter a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the net amount recovered against such third person. Such net amount shall be equal to the actual amount recovered less the expenses reasonably incurred by such person in respect to such proceedings (including reasonable attorneys' fees).

(g) Compromise obtained by person entitled to compensation

(1) If the person entitled to compensation (or the person's representative) enters into a

settlement with a third person referred to in subsection (a) of this section for an amount less than the compensation to which the person (or the person's representative) would be entitled under this chapter, the employer shall be liable for compensation as determined under subsection (f) of this section only if written approval of the settlement is obtained from the employer and the employer's carrier, before the settlement is executed, and by the person entitled to compensation (or the person's representative). The approval shall be made on a form provided by the Secretary and shall be filed in the office of the deputy commissioner within thirty days after the settlement is entered into.

(2) If no written approval of the settlement is obtained and filed as required by paragraph (1), or if the employee fails to notify the employer of any settlement obtained from or judgment rendered against a third person, all rights to compensation and medical benefits under this chapter shall be terminated, regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this chapter.

(3) Any payments by the special fund established under section 944 of this title shall be a lien upon the proceeds of any settlement obtained from or judgment rendered against a third person referred to under subsection (a) of this section. Notwithstanding any other provision of law, such lien shall be enforceable against such proceeds, regardless of whether the Secretary on behalf of the special fund has agreed to or has received actual notice of the settlement or judgment.

(4) Any payments by a trust fund described in section 917 of this title shall be a lien upon the proceeds of any settlement obtained from or judgment recorded against a third person referred to under subsection (a) of this section. Such lien shall have priority over a lien under paragraph (3) of this subsection.

(h) Subrogation

Where the employer is insured and the insurance carrier has assumed the payment of the compensation, the insurance carrier shall be subrogated to all the rights of the employer under this section.

(i) Right to compensation as exclusive remedy

The right to compensation or benefits under this chapter shall be the exclusive remedy to an employee when he is injured, or to his eligible survivors or legal representatives if he is killed, by the negligence or wrong of any other person or persons in the same employ: *Provided*, That this provision shall not affect the liability of a person other than an officer or employee of the employer.

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